Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–538–93
EUSOFF CHIN CHIEF JUSTICE, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ
13 APRIL 1995

Contract *— Building contract — Payment under interim certificates — Whether employer obliged to pay upon being served with certificate — Whether employer can claim set-off with cross-claims for damages in respect of defective works*

Contract *— Building contract — Set-off — Whether employer can set off claims for defective work against contractor's claim for work done — Whether terms of the building contract inconsistent with common law right of set-off — Whether common law right of set-off extinguished*

Civil Procedure *— Summary judgment — Interim building certificates — Whether employer under building contract obliged to pay interim certificate upon being served — Whether can rely on cross-claims by way of defence — Rules of the High Court 1980 O 14*

The issue which arose for decision was whether an employer under a building contract was under an obligation to pay upon being served with the penultimate progress payment certificate when it had made cross-claims for liquidated and non-liquidated damages against the builder arising from its performance of the contract. The appellant ('the builder') agreed to construct a private hospital to be named 'Dr Leela Medical Centre' for the respondent ('the employer'). Clause 30(1) of the contract provided that the architect would issue an interim progress payment certificate to the builder to be presented to the employer who would then make the payment within 21 days from the date of presentation. On 3 August 1992, the architect issued the penultimate progress payment certificate ('the certificate') for a sum of RM433,288.97. The employer failed to make the payment and filed a cross-claim for damages against the builder for defective work and over-valuation The builder sued the employer and sought summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') alleging that the employer was under an obligation to pay at once the sum appearing in the certificate issued by the architect regardless of pending disputes. The builder contended that on a proper construction of the contract, it was not open to the employer to rely on its cross-claims as a defence to the application for summary judgment. On the other hand, the employer submitted that it was entitled to set off its claim for damages against the builder's claim and that it was entitled to challenge the correctness of the certificate by referring the dispute to arbitration as provided in cl 34(1) of the contract. However, the High Court judge held in favour of the employer, giving it unconditional leave to defend, on the ground that the affidavit evidence had disclosed triable issues which required determination at a trial. The builder has appealed.

Held, allowing the appeal:

(1) As the employer did not refer the dispute concerning the certificate to arbitration and, having entered appearance and filed a defence to the action, it was precluded from taking advantage of the remedy of arbitration provided for in cl 34(1).

(2) Under the terms of cl 30(1), the period for honouring interim certificates was 21 days from the date of presentation to the employer. The seriousness of the requirement in the contract for the due honouring of an interim certificate was emphasized by cl 26(1)(a), which allowed the builder to determine the contract or to suspend works if the employer did not pay the certified sum, and by cl 30(6)(b), which allowed for adjustments in the final certificate.

(3) There was no provision in the contract requiring the builder to execute the works to the satisfaction of the employer but only an obligation to comply with the instructions of the architect. As the architect had not directed the builder to execute rectification works, arising from the complaints of the employer of defective works, materials and/or over-valuation, the builder was under no contractual obligation to comply with those complaints unless supported by written instructions issued by the architect.

(4) The issue whether the right of set-off or counterclaim can be raised in answer to interim certificates depends in each case upon the particular wording of the contract. The court did not agree with the opinion of Lord Denning in *Dawnays Ltd v FG Minter Ltd & Anor* [1971] 2 All ER 1389; [1971] 1 WLR 1205 that an interim certificate is to be regarded virtually as cash, like a bill of exchange. There is no special rule of construction operating in building contract cases which negatives the ordinary common law right of set-off enunciated in *Mondel v Steel* (1841) 8 M & W 858; [1835–42] All ER Rep 511.

(5) The express enumeration of permitted set-offs in the contract could imply that the employer was limited to making deductions which fell strictly within the scope of the permitted set-offs on the basis of the *expressio unius* principle. In this case, although there were seven express provisions in the contract whereby the employer had the right of set-off, none of them were relevant to the set-off which was contended. Having regard to these provisions of the contract, and applying the *expressio unius* principle, the common law right of set-off had been extinguished, not expressly but by clear implication.

Obiter:

(1) When the employer is under no obligation to pay upon being served with a progress payment certificate due to pending disputes, allegations of defects or claims for delay without reasonable details and quantification are unlikely to result in the dismissal of

an application for summary judgment under O 14 and leave to defend being given.

(2) The employer was at liberty to litigate its cross-claims, should it so wish.

[Bahasa Malaysia summary

Isu yang timbul untuk keputusan adalah sama ada seorang majikan di bawah suatu kontrak pembinaan berkewajipan untuk membayar sebaik sahaja disampaikan dengan perakuan bayaran berperingkat kedua yang terakhir apabila ia telah membuat tuntutan balas untuk ganti rugi jumlah tertentu dan jumlah tak tertentu terhadap pembina akibat daripada pelaksanaan kontrak itu. Perayu ('pembina itu') telah berjanji untuk membina sebuah hospital swasta yang akan dinamakan 'Dr Leela Medical Centre' bagi responden ('majikan itu'). Fasal 30(1) kontrak itu mensyaratkan bahawa arkitek akan mengeluarkan satu perakuan bayaran berperingkat interim kepada pembina untuk disampaikan kepada majikan yang kemudiannya akan membuat bayaran dalam tempoh 21 hari dari tarikh penyampaian. Pada 3 Ogos 1992, arkitek tersebut telah mengeluarkan perakuan bayaran berperingkat kedua yang terakhir ('perakuan itu') untuk jumlah RM433,288.97. Majikan gagal membuat bayaran itu dan memfailkan tuntutan balas untuk ganti rugi terhadap pembina itu untuk kerja-kerja cacat dan penilaian terlebih. Pembina itu telah mendakwa majikan dan memohon penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') mengatakan bahawa majikan berkewajipan untuk membayar dengan segera jumlah yang dinyatakan dalam perakuan yang dikeluarkan oleh arkitek tanpa menghiraukan pertikaian yang belum selesai. Pembina menegaskan bahawa atas pentafsiran betul kontrak itu, majikan tidak boleh bergantung pada tuntutan balasnya sebagai satu pembelaan kepada permohonan untuk penghakiman terus. Sebaliknya, pembina mengatakan bahawa ia berhak untuk mendapatkan suatu tolakan untuk tuntutan ganti ruginya terhadap tuntutan pembina dan ia berhak mencabar kebetulan perakuan itu dengan merujukkan pertikaian itu untuk ditimbangtara sebagaimana diperuntukkan di dalam fasal 34(1) kontrak tersebut. Walau bagaimanapun, hakim Mahkamah Tinggi telah memutuskan dengan memihak kepada majikan, memberikannya kebenaran membela tanpa syarat, atas alasan bahawa keterangan afidavit telah mendedahkan isu-isu yang perlu dibicarakan yang memerlukan penentuan pada satu perbicaraan. Pembina itu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Memandangkan majikan tidak pernah merujukkan pertikaian mengenai perakuan itu untuk ditimbangtara dan, setelah memasukkan kehadiran dan memfailkan pembelaan kepada tindakan guaman itu, ia dihalang daripada mengambil kesempatan remedi timbangtara yang diperuntukkan di dalam fasal 34(1).

(2) Di bawah terma fasal 30(1) kontrak itu, tempoh untuk melunaskan perakuan interim ialah 21 hari dari tarikh penyampaiannya kepada majikan. Betapa seriusnya keperluan bahawa perakuan interim itu mesti dilunaskan dengan wajarnya ditekankan di dalam fasal 26(1)(a) kontrak tersebut, yang membolehkan pembina itu menamatkan kontrak itu atau untuk menggantung kerja sekiranya majikan tidak membayar jumlah yang disahkan itu, dan melalui fasal 30(6)(b), yang membenarkan pelarasan dibuat di dalam perakuan terakhir.

(3) Tidak terdapat peruntukan di dalam kontrak itu yang memerlukan pembina melaksanakan kerja-kerja hingga majikan berpuas hati tetapi hanya satu kewajipan untuk mematuhi arahan arkitek. Memandangkan arkitek tidak mengarahkan pembina itu untuk melaksanakan kerja pembetulan, akibat daripada aduan majikan tentang kecacatan kerja, bahan-bahan dan/atau penilaian terlebih, pembina tidak berkewajipan kontraktual untuk mematuhi aduan tersebut kecuali jika disokong dengan arahan bertulis yang dikeluarkan oleh arkitek.

(4) Isu sama ada hak tolakan atau tuntutan balas boleh dibangkitkan sebagai jawapan kepada perakuan interim bergantung dalam setiap kes pada susunan kata tertentu kontrak yang berkenaan. Mahkamah tidak bersetuju dengan pendapat Lord Denning dalam *Dawnays Ltd v FG Minter Ltd & Anor* [1971] 2 All ER 1389; [1971] 1 WLR 1205 bahawa suatu perakuan interim perlu dianggap hampir-hampir sebagai wang tunai, seperti suatu bil pertukaran. Tidak terdapat rukun pentafsiran khas yang beroperasi dalam kes kontrak pembinaan yang menafikan hak common law biasa untuk mendapat suatu tolakan seperti yang dijelaskan dalam *Mondel v Steel* (1841) 8 M & W 858; [1835–42] All ER Rep 511.

(5) Penyebutan tolakan yang dibenarkan satu per satu secara nyata dalam kontrak itu boleh menandakan bahawa majikan adalah terhad kepada membuat pemotongan yang jatuh semata-mata dalam skop tolakan yang dibenarkan atas dasar prinsip *expressio unius*. Di dalam kes ini, walaupun terdapat tujuh peruntukan nyata dalam kontrak itu di bawah mana majikan mempunyai hak tolakan, tiada satupun di antaranya yang relevan kepada hak yang ditegaskannya. Dengan mengambil berat terhadap peruntukan tersebut dalam kontrak itu, dan menggunakan prinsip *expressio unius*, hak tolakan di sisi common law telah dilenyapkan, bukan secara nyata tetapi melalui implikasi jelas.

Obiter:

(1) Apabila majikan tidak berkewajipan untuk membayar apabila disampaikan dengan suatu perakuan bayaran berperingkat kerana terdapat pertikaian yang belum selesai, dakwaan mengenai kecacatan atau tuntutan untuk kelewatan tanpa memberikan butiran yang munasabah dan menyatakan kuantiti, tidak mungkin mengakibatkan permohonan untuk penghakiman terus di bawah A 14 KMT diketepikan dan kebenaran membela diberikan.

A (2) Majikan adalah bebas untuk mendakwa tuntutan balasnya, sekiranya ia ingin berbuat demikian.]

Notes

For cases on building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 B Reissue) paras 1245–1337.

Cases referred to

Acsim (Southern) Ltd v Dancon Danish Contracting & Development Ltd (1989) 47 BLR 55 (not folld)

C *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd* [1974] 2 MLJ 94 (not folld)

Dawnays Ltd v FG Minter Ltd & Anor [1971] 2 All ER 1389; [1971] 1 WLR 1205 (refd)

Ellis Mechanical Services Ltd v Wates Construction Ltd [1978] 1 Lloyd's Rep 33 (folld)

D *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; [1973] 3 All ER 195; [1973] 3 WLR 421 (refd)

Gold v Patman & Anor [1958] 2 All ER 497; [1958] 1 WLR 697 (refd)

Hiap Hong & Co Pte Ltd v Hong Huat Co (Pte) Ltd [1987] 2 MLJ 551 (refd)

E *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd* [1992] 1 SLR 884; [1991] APCLR 515 (refd)

John Sisk & Sons v Lawter Products BV (High Court 1976/1124) (Ireland) (unreported) (folld)

Kilby & Gayford Ltd v Selincourt Ltd (1973) 229 EG 1343 (refd)

F *Mondel v Steel* (1841) 8 M & W 858; [1835–42] All ER Rep 511 (folld)

Mottram Consultants Ltd v Bernard Sunley & Sons Ltd [1975] 2 Lloyd's Rep 197 (refd)

Northern Regional Health Authority v Derek Crouch Construction Co Ltd G [1984] 1 QB 644; [1984] 2 All ER 175; [1984] 2 WLR 676 (refd)

Sutcliffe v Thackrah & Ors [1974] AC 727; [1974] 1 All ER 859; [1974] 2 WLR 295 (refd)

Legislation referred to

H Street, Drainage and Building Act 1974
Rules of the High Court 1980 O 14
Uniform Building By-Laws (Federal Territory, Kuala Lumpur) 1984
Rules of the Supreme Court O 14 [Eng]

I **Appeal from**: Civil Suit No S2–22–490–92 (High Court, Kuala Lumpur)

Low Kim Leng (*Lua Ai Siew* with him) (*Soo Thien Ming & Shahrizat*) for the appellant.

Joginder Singh (*Joginder Singh & Co*) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): The issue of central importance to this appeal is whether in O 14 proceedings, upon the proper construction of a building contract dated 27 April 1989 ('the contract'), whereby the plaintiff, Pembenaan Leow Tuck Chui & Sons Sdn Bhd ('the builder'), had agreed to construct a private hospital to be named 'Dr Leela Medical Centre' for the defendant, Dr Leela's Medical Centre Sdn Bhd ('the employer'), there is an obligation imposed upon the employer to pay at once the sum of RM433,288.97 appearing in the penultimate progress payment certificate issued on 3 August 1992 by the architect ('the penultimate progress payment certificate'), pursuant to cl 30(1) of the contract, regardless of pending disputes, including cross-claims by the employer alleging defective work or over-valuation, which allegedly exceeded the sum so certified.

More particularly, the gist of the affidavit of the managing director of the employer had alleged the following defective materials and workmanship: poor quality bricks resulting in shrinkage and cracks; poor quality concrete workmanship resulting in cracks in the floor of the operating theatre; basement leakage; defective water heater causing the air-conditioning unit to malfunction; pit of lift not being waterproof and so had caused the lift to malfunction.

The employer had further alleged, by its statement of defence, that it was entitled to challenge the correctness of the penultimate progress payment certificate by referring the dispute to arbitration, by virtue of cl 34(1) which provides:

> In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in cl 30(5)(a) of these conditions or the rights and liabilities of the parties under cll 25, 26, 31 or 32 of these conditions), then such disputes or differences shall be referred to arbitration.
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> Upon the disputes or differences having arisen any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties or failing agreement or absence of reply or reluctance to act by the other party then the party may, after the expiry of 14 days from the date of the notice to concur on the appointment of an arbitrator, apply to the president or vice president for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement, be deemed to be appointed with the agreement and consent of the parties to the contract.
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> Upon appointment, the arbitrator shall with despatch initiate the arbitration proceedings following the provisions of the Arbitration Act 1952 (Rev 1972). The hearing may be 'ex parte' should either party, having been given due notice, fail to attend.

Taking the second of these contentions by the employer first, the employer never did refer the dispute concerning the penultimate progress payment certificate, the subject matter of this appeal, to arbitration and having

A entered appearance and filed a defence to the action is precluded from taking advantage of the remedy of arbitration provided for in cl 34(1).

We note, in passing, the dictum of Sir John Donaldson MR in the Court of Appeal case of *Northern Regional Health Authority v Derek Crouch Constructon Co Ltd* [1984] 1 QB 644; [1984] 2 All ER 175; [1984] 2 WLR B 676 that the 'open up and revise' provisions of the sort provided for in cl 34(1) of the contract and regularly encountered in the construction industry, had the effect that courts, by contrast with arbitrators, would have no power to depart from the day to day opinions or decisions on the merits of certifying architects or engineers and, a fortiori, their certificates. This view, according to Sir John, had the advantage of reducing the C backlog of overcrowded judicial lists of construction cases in the Court of the Official Referees. We note, however, that *Crouch* has come under heavy fire in an article by Mr Ian Duncan Wallace QC entitled 'Loose Cannons in the Court of Appeal: On Demand Per Incuriam?' reported in (1994) 10 Const LJ 190.

D Turning to the first of the employer's contentions alleging defective materials, workmanship and over-valuation, counsel for the builder, in his reply, had attacked the bona fides of these complaints by drawing our attention to a number of specific matters.

We did not, however, embark upon a consideration of the rights and E wrongs of the complaints made by the employer regarding the builder's performance of the contract. This was because in the view we took of this appeal — after, of course, listening to the submissions of counsel on both sides — the question of critical substance which arose for decision was: what were the obligations of the employer to pay upon being served with F the penultimate progress payment certificate under the contract when, as here, the employer has made claims for liquidated and non-liquidated damages against the builder arising from its performance of the contract?

For the builder, it was contended that clearly, upon a proper construction of the contract, it was not open to the employer to rely on G their claims for liquidated and non-liquidated damages by way of defence to the claim based on the penultimate progress payment certificate, for summary judgment under O 14. It was said that these reliefs must be sought elsewhere.

On the other hand, for the employer it was contended that the H answer to the question raised was far from clear, and that therefore, its determination should be left for the final hearing.

Broadly stated, in the High Court at Kuala Lumpur (Commercial Division), the learned judge (Wan Mohammad J) had held in favour of the employer giving it unconditional leave to defend, on the ground that the affidavit evidence had disclosed triable issues which required determination I at a trial in open court, and from that decision the builder had appealed to this court.

It is well known to lawyers engaged in the field of construction contract law that the question whether a building owner or main contractor is entitled to refuse to make payment of money to a contractor or sub-

contractor, as the case may be, allegedly due and payable under an interim certificate issued by an architect or engineer, pursuant to provisions in a RIBA contract and other known forms of building contracts and sub-contracts, on the ground that he has cross-claims alleging defective work or over-valuation or damages for delay, is a question of ever-recurring importance, which inevitably throws open for discussion the actual terms of the particular contract or sub-contract in the case and the all too familiar trilogy of cases of *Dawnays Ltd v FG Minter Ltd & Anor* [1971] 2 All ER 1389; [1971] 1 WLR 1205, *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; [1973] 3 All ER 195; [1973] 3 WLR 421, *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 and their progeny.

To revert to the question of central importance to this appeal referred to in the opening paragraph of this judgment, we would make the preliminary observation that the penultimate progress payment certificate, the subject matter of this appeal, was, having regard to *Hiap Hong & Co Pte Ltd v Hong Huat Co (Pte) Ltd* [1987] 2 MLJ 551, undoubtedly an interim certificate within the meaning of cl 30(1) of the contract which provides:

> At the period of interim certificate named in the appendix to these conditions the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall, on presenting any such certificate to the employer, be entitled to payment therefor within the period for honouring certificates named in the appendix to these conditions. Interim valuations shall be made whenever the architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an interim certificate.

We must now embark upon an analysis of the other relevant clauses in the contract and determine its scheme.

The period by which the architect is bound to make his estimate of the contract value of the work done and determine the sum which he considers is due to the builder and issue an interim certificate for such sum is one month from receipt of the progress claim. The period for the honouring of interim certificates issued under cl 30(1) is 21 days from date of presentation thereof to the employer.

In these circumstances, the question which arose for decision on cl 30(1) was *when* the amount certified in an interim certificate became due and payable.

It is obvious from a reading of cl 30(1) and the appendix to the contract, as we have already noted, that the builder shall be entitled to payment of the sum so certified *within* 21 days from the date of the presentation to the employer of an interim certificate. In other words, although *the right* to payment of the sum so certified will have accrued upon presentation of an interim certificate to the employer, payment thereof may not be *enforced* until expiry of the period of 21 days.

We note that nowhere in the contract is there any provision for the payment of interest in the event of the employer being late with the payment of sums certified under cl 30(1).

Clause 30(2) explains how the amount certified in an interim certificate is to be calculated; it provides:

> The amount stated as due in an interim certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered to or adjacent to the works for use thereon up to and including a date not more than seven days before the date of the said certificate less any amount which may be retained by the employer (as provided in sub-cl (3) of this condition) and less any instalments previously paid under this condition. Provided that such certificate shall only include the value of the said materials and goods as and from such time as they are reasonably, properly and not prematurely brought to or placed adjacent to the works and then only if adequately protected against weather or other casualties.

Clause 30(3), read with the appendix to the contract, goes on to say that the maximum permissible sum which may be retained by the employer referred to in cl 30(2) is RM215,730.21. Clause 30(3) provides:

> The employer may retain the percentage of the total value of the work, materials and goods referred to in sub-cl (2) of this condition which is named in the appendix to these conditions as percentage of certified value retained. Provided always that when the sum of the amounts so retained equals the amount named in the said appendix as limit of retention fund or that amounts as reduced in pursuance of cl 16(f) and/or cl 27(e) of these conditions, as the case may be, no further amounts shall be retained by virtue of this sub-clause.

The only provisions in the contract permitting the employer to make deductions from the sums certified by the architect are these:

Clause 2(1), which deals with the costs of appointing other contractors to replace the builder when he does not comply with the instructions of the architect and to deduct the cost incurred thereby from any moneys due or to become due to the contractor under the contract; it provides:

> The contractor shall (subject to sub-cll (2) and (3) of this condition) forthwith comply with all instructions issued to him by the architect in regard to any matter in respect of which the architect is expressly empowered by these conditions to issue instructions. If within seven days after receipt of a written notice from the architect requiring compliance with an instruction the contractor does not comply therewith, then the employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any moneys due or to become due to the contractor under this contract.

In addition, the contract provides for a defects liability period of 12 months from the date named in the certificate of practical completion (cll 15, 16 and 30).

The contract has, therefore, built into it a mechanism for deducting the cost of rectification of defective work from later progress payment certificates.

Clause 19(3), which deals with the amount paid for insurance premium for insurance against injuries if the builder makes default in taking out such insurance; it provides:

> Should the contractor or any sub-contractor make default in insuring or in continuing to insure as provided in sub-cll (1) and (2) of this condition, the employer may himself insure against any risk with respect to which the default shall have occurred and may deduct a sum equivalent to the amount paid in respect of premiums from any moneys due or to become due to the contractor.

Clause 20(A), which deals with the amount paid for fire insurance if the builder makes default in taking out such insurance; it provides:

> The contractor shall, in the joint names of the employer and contractor insure against loss and damage by fire, storm, tempest, lightning, flood, earthquake, aircraft or anything dropped therefrom, aerial objects, riot and civil commotion for the full value thereof (plus the percentage named in the appendix to these conditions to cover professional fees) all work executed and all unfixed materials and goods intended for, delivered to and placed on or adjacent to the works, but excluding temporary buildings, plant, tools and equipment owned or hired by the contractor or any sub-contractor, and shall keep such work, materials and goods so insured until practical completion of the works. Such insurance shall be with insurers approved by the architect and the contractor shall deposit with him the policy or policies and the receipts in respect of premiums paid; and should the contractor make default in insuring or continuing to insure as aforesaid, the employer may himself insure against any risk with respect of which the default shall have occurred and deduct a sum equivalent to the amount paid by him in respect of premiums from any moneys due or to become due to the contractor.

Clause 22, which deals with total fines for delay as certified by the architect; it provides:

> If the contractor fails to complete the works by the date for completion stated in the appendix to the conditions or within any extended time fixed under cl 23 or cl 32(1)(c) of these conditions and the architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the contractor shall pay or allow to the employer a sum calculated at the rate stated in the said appendix as liquidated and ascertained damages for the period during which the works shall so remain or have remained incomplete, and the employer may deduct such sum from any moneys due or to become due to the contractor under this contract.

We note, in passing, that according to the penultimate progress payment certificate, the subject matter of this appeal, the architect had stated that there had been a delay of seven days and had imposed a fine which sum he had deducted from the sum certified to be due to the builder.

Clause 25(3), which deals with the total amount paid to suppliers or sub-contractors for goods and materials supplied; it provides:

> In the event of the employment of the contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the employer and contractor:
>
> ...

A (b) The contractor shall, if so required by the employer or architect within 14 days of the date of determination, assign to the employer without payment the benefit of any agreement for the supply of materials or goods and/or for the execution of any work for the purposes of this contract but on the terms that a supplier or sub-contractor shall be entitled to make any reasonable objection to any further assignment B thereof by the employer. In any case the employer may pay any supplier or sub-contractor for any materials or goods delivered or works executed for the purposes of this contract (whether before or after the date of determination) in so far as the price thereof has not already been paid by the contractor. The employer's rights under this paragraph are in addition to his right to pay nominated sub-contractors as provided in cl C 27(c) of these conditions and payments made under this paragraph may be deducted from any sum due or to become due to the contractor.

Clause 27(iii), which deals with total payments to nominated sub-contractors; it provides:

D That the nominated sub-contractor shall indemnify the contractor against the same liabilities in respect of the sub-contract works as those for which the contractor is liable to indemnify the employer under this contract.

Clause 30(3), which deals with the total retention sum which has been quoted above.

The seriousness of the requirement in the contract for the due E honouring of an interim certificate is emphasized by cll 26(1)(a) and 30(6)(b). Clause 26(1)(a), which allows the builder to determine the contract or to suspend works if the employer does not pay the certified sum; it provides:

Without prejudice to any other rights and remedies which the contractor F may possess, if:

(a) The employer does not pay to the contractor the amount due on any certificate within the period for honouring certificates named in the appendix to these conditions and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the contractor stating that notice of determination under this condition will G be served if payment is not made within seven days from receipt thereof.

Clause 30(6), which allows for adjustments in the final certificate if the adjustment is necessary in accordance with the terms therein contained; it provides:

H So soon as is practicable but before the expiration of three months from the end of the defects liability period stated in the appendix to these conditions or from completion of making good defects under cl 15 of these conditions or from receipt by the architect of the documents referred to in para (b) of sub-cl (5) of this condition, whichever is the latest, the architect shall issue I the final certificate. The final certificate shall state:

(a) The sum of the amount paid to the contractor under interim certificate and the amount named in the said appendix as limit of retention fund; and

(b) The contract sum adjusted as necessary in accordance with the terms of these conditions,

and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the contractor from the employer or to the employer from the contractor as the case may be. Subject to any deductions authorized by these conditions, the said balance as from the 14th day after presentation of the final certificate by the contractor to the employer shall be a debt payable by the employer to the contractor or as the case may be as from the 14th day after issue of the final certificate shall be a debt payable by the contractor to the employer.

Clause 30(8) provides that no certificate other than the final certificate of the architect 'shall of itself be conclusive evidence that any works, materials or goods to which it relates are in accordance with this contract'.

Clause 34(3) empowers the arbitrator 'to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute ... in the same manner as if no certificate, opinion, decision requirement, or notice had been given'.

Clause 34(2) although providing that references to arbitration 'shall not be opened' until after practical completion or alleged practical completion of the main contract work, goes on to provide by way of exception, inter alia, for disputes, as to 'whether or not a certificate has been improperly withheld or is not in accordance with these conditions'.

At this point, we would pause to note that the scheme of the contract indicates that the builder is to be paid at regular intervals in accordance with the value of the work he has completed.

Other provisions of the contract which touch on the authority and duties of the architect are these:

Clause 1(1), which shows that the contractor is obliged to execute and complete the works to the reasonable satisfaction of the architect; it provides:

> The contractor shall, upon and subject to these conditions, carry out and complete the works shown upon the contract drawings and described by or referred to in the contract bills and in these conditions in every respect to the reasonable satisfaction of the architect.

Clause 2(1) imposes an obligation upon the contractor to comply with all instructions issued by the architect to him and cl 2(3) provides for the form which the instructions should take; they provide:

> 2(1) The contractor shall (subject to sub-cll (2) and (3) of this condition) forthwith comply with all instructions issued to him by the architect in regard to any matter in respect of which the architect is expressly empowered by these conditions to issue instructions. If within seven days after receipt of a written notice from the architect requiring compliance with an instruction the contractor does not comply therewith, then the employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any moneys due or to become due to the contractor under this contract.

A 2(3) All instructions issued by the architect shall be issued in writing. Any instruction issued orally shall be of no immediate effect, but shall be confirmed in writing by the contractor to the architect within seven days, and if not dissented from in writing by the architect to the contractor within seven days from receipt of the contractor's confirmation shall take effect as from the expiration of the latter said B seven days.

Clause 6 imposes a duty upon the architect to ensure that all materials, goods and works of the builder comply with the specifications and results of tests and inspections; it provides:

C (1) All materials, goods and workmanship shall so far as procurable be of the respective kinds and standards described in the contract bills.

(2) The contractor shall upon the request of the architect furnish him with vouchers to prove that the materials and goods comply with sub-cl (1) of this condition.

D (3) The architect may issue instructions requiring the contractor to open up for inspection any work covered up or to arrange for or carry out any test of any materials or goods (whether or not already incorporated in the works) or of any executed work, and the cost of such opening up or testing (together with the cost of making good in consequences thereof) shall be added to the contract sum unless provided for in the contract bills or unless the inspection or test shows that the work, materials or E goods are not in accordance with this contract.

(4) The architect may issue instructions in regard to the removal from the site of any work, materials or goods which are not in accordance with this contract.

(5) The architect may (but not unreasonably or vexatiously) issue instructions requiring the dismissal from the works of any person F employed thereon.

Pausing at this point, we would observe that nowhere in the contract is there any provision whereby the builder must execute the works to the satisfaction of the employer according to the contract, the only instructions which the builder is under an obligation to comply with are those emanating G from the architect. This would be in accordance with the reasonable expectations of businessmen engaged in the construction industry. Were it otherwise and, say, the builder were also under an obligation to comply with instructions emanating from the employer, a situation could arise where the builder might be faced with conflicting instructions from the architect and the employer, with resulting confusion, not conducive to a H smooth performance of a contract.

Cast in his role of a professional middleman, the architect should, prima facie, be in an ideal position to ensure that both employer and contractor punctually carry out their respective obligations under the contract. This is not to say that if the employer is dissatisfied with the I performance of his architect, he is without remedy. In such a situation, the employer may terminate the services of his architect and appoint a substitute architect or even sue his old architect. (See *Sutcliffe v Thackrah & Ors* [1974] AC 727; [1974] 1 All ER 859; [1974] 2 WLR 295.)

It is true that in the present case, the employer had terminated the services of the architect but this was at a very late stage, and had replaced

him with a new architect. However, we were informed from the Bar that no suit had, up to the date of the determination of this appeal, been commenced by the employer against the architect.

Article 3 says that the architect is appointed by the employer and that no person subsequently appointed shall be entitled to disregard or overrule any certificate given by the architect for the time being; it provides as follows:

> The term 'the architect' in the said conditions shall mean the said Daya Bina Akitek (M) Sdn [Bhd] of 58A, Kompleks Damai, Jalan Lumut, 50400 Kuala Lumpur or, in the event of his death or ceasing to be the architect for the purpose of this contract, such other person as the employer shall nominate for that purpose not being a person to whom the contractor shall object for reasons considered to be sufficient by an arbitrator appointed in accordance with cl 34 of the said conditions. Provided always that no person subsequently appointed to be the architect under this contract shall be entitled to disregard or overrule any certificate or opinion or decision or approval or instruction given or expressed by the architect for the time being.

Clause 15 empowers the architect to direct the builder to rectify any defects and faults in the works as a result of materials used or works done, which are not in accordance with the provisions of the contract; it provides:

> (1) When in the opinion of the architect the works are practically completed, he shall forthwith issue a certificate to that effect and practical completion of the works shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate.
>
> (2) Any defects, shrinkages or other faults which shall appear within the defects liability period stated in the appendix to these conditions and which are due to materials or workmanship not in accordance with this contract shall be specified by the architect in a schedule of defects which he shall deliver to the contractor not later than 14 days after the expiration of the said defects liability period, and within a reasonable time after receipt of such schedule, the defects, shrinkages and other faults therein specified shall be made good by the contractor and (unless the architect shall otherwise instruct, in which case the contract sum shall be adjusted accordingly) entirely at his own cost.
>
> (3) Notwithstanding sub-cl (2) of this condition, the architect may whenever he considers it necessary so to do, issue instructions requiring any defect, shrinkage or other fault which shall appear within the defects liability period named in the appendix to these conditions and which is due to materials or workmanship not in accordance with this contract to be made good, and the contractor shall within a reasonable time after receipt of such instructions comply with the same and (unless the architect shall otherwise instruct, in which case the contract sum shall be adjusted accordingly) entirely at his own cost. Provided that no such instruction shall be issued after delivery of a schedule of defects or after 14 days from the expiration of the said defects liability period.
>
> (4) When in the opinion of the architect any defects, shrinkages or other faults which he may have required to be made good under sub-cll (2) and (3) of this condition shall have been made good, he shall issue a certificate to that effect, and completion of making good defects shall

A be deemed for all the purposes of this contract to have taken place on the day named in such certificate.

Pausing at this point, it is noteworthy that the architect had not invoked his powers under cl 15 to direct the builder to execute rectification works, arising from the complaints of the employer of defective works, materials B and/or over-valuation. As already pointed out, the builder was under no contractual obligation to comply with these complaints of the employer unless supported by written instructions issued by the architect pursuant to cl 2(1).

Having regard to the terms of the contract, if the employer had C considered that the architect had failed in his duty to make the necessary deductions because of alleged defective work or materials as being not in accordance with the terms of the contract thus resulting in over-certification of the sums payable, the employer had three remedies open to him, namely:

D (i) to request the architect to make appropriate adjustments in another certificate; or

(ii) if the architect declined to comply with that request, then to take the dispute to arbitration; or

(iii) to sue the architect. (See *Sutcliffe v Thackrah & Ors.*)

E To complete the picture of the factual matrix in this case, the following matters should be noted:

(1) There was contemporary correspondence passing between the parties and the architect which indicated that:

F (a) the employer had repeatedly prevented the builder from carrying out repairs to defective works as certified by the architect;

(b) after the certified defects had been finally completed, the employer had prevented the exercise of a joint inspection by all concerned; and

G (c) the employer had, at a very late stage, terminated the services of the architect and had refused to appoint a replacement, thus preventing the issuance of the final certificate.

(2) The building called 'The Dr Leela Medical Centre' was completed and a temporary certificate for occupation, dated 11 September H 1990, was issued by the Dewan Bandaraya, Kuala Lumpur, pursuant to the provisions of the Street, Drainage and Building Act 1974 and the Uniform Building By-Laws (Federal Territory, Kuala Lumpur) 1984.

The next part of the case which logically calls for consideration is a I discussion of the cases, *Dawnays Ltd v FG Minter Ltd & Anor* [1971] 2 All ER 1389; [1971] 1 WLR 1205, *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; [1973] 3 All ER 195; [1973] 3 WLR 421, *Mottram Consultants v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 and some of their progeny.

In the *Dawnays* case, a sub-contractor's application for summary judgment under O 14 of the Rules of the Supreme Court for recovery of sums of money contained in an interim certificate issued by the owner's architect, was opposed by the main contractor on the ground that cl 13 of the 'green form' of nominated sub-contract provided:

> The contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set off against any money due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under the sub-contract.

There was also a comprehensive arbitration clause and clauses in pari materia with cl 34(2), (3) and (8) in the present case, referred to above. The main contractor put in its affidavit setting up a cross-claim for delay and relied on the arbitration clause, saying it was ready and willing for the dispute to be referred to arbitration. It succeeded before the Master and the judge to obtain a stay. The sub-contractor appealed. The main contractor's defence was given short shrift by the Court of Appeal. In the course of his judgment, Edmund-Davies LJ (as he then was), who confined himself to the construction of cl 13 of the sub-contract, gave his *reasons* for rejecting the defence ([1971] 2 All ER 1389 at pp 1393F–1394F; [1971] 1 WLR 1205 at pp 1210C–1211D) with which, incidentally, we entirely agree, in the following terms :

> There is no doubt that, having made allowance for some three weeks' delay, an interim certificate was issued in favour of the sub-contractor in the sum of £27,000 odd. Accordingly, under the terms of cl 11(b) of the sub-contract, the sub-contactors were entitled, within 14 days of the receipt by the contractor of that certificate, to be paid the full amount thereof, subject only to such deductions as are specified in that sub-clause. These are, first, retention money; secondly, a cash discount of 2½% on the difference between the total value and the retention money; and thirdly, amounts already paid. But cl 13, which is strongly relied upon by Mr Knight, and understandably so, provides that:
>
> > 'The contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set off against any money due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under this sub-contract.'
>
> Mr Knight submits that cl 13 must be read together with cl 11(b), with the result that, wherever the main contractor asserts a money claim against a sub-contractor, he is entitled to deduct the amount of that claim against the sum to which the sub-contractor would otherwise be entitled under the interim certificate. That seems to me, with respect, an alarming submission. The result would be that the simple fact that the main contractor makes an assertion of some liability in the sub-contractor to pay him something is sufficient to entitle the former to hold up payment. The practical result would be to render available to any main contractor a ready means of avoiding payment out to the sub-contractor even of sums which the building owner had already paid the main contractor in respect of sub-contract work covered by interim certificates. That is, indeed, the position here, for the defendants have received every penny of the £27,000 odd now claimed. Can Mr Knight utilize cl 13 in that way in the present case? In my judgment,

clearly not. Its concluding words refer to 'any sum or sums which the sub-contractor is liable to pay' — not 'may be liable to pay', nor 'which is asserted by the main contractor to be due.' Mr Knight cannot quantify even roughly what the sum is that the sub-contractor is so liable to pay. We are told that the main contractor asserts that as a result of unreasonable delays by the plaintiffs, a sum in the region of £47,000 may be payable. More recently, however, the claim is said to be in the region of £61,000. But all that is in the limbo of the unknown. The simple fact is that the defendants can assert no definite and liquidated sum as being unquestionably due to them from the plaintiffs. Unless and until they can do this, they cannot invoke cl 13 in the manner sought by the defendants. Any other view would involve that the sub-contractor could be kept out of his money until the contract is completed, whereupon the main contractor would condescend to go to arbitration about the matter. In the result, a sub-contractor could be kept out of his money for an unconscionable period, with possibly disastrous financial results. I should require the clearest possible provision in the sub-contract before I would conclude that this was what the parties understood and intended and that this was, indeed, the result of the agreement arrived at.

There is express provision in the main contract, on the other hand, which deals with delay. It refers to deductions in respect of, 'any sum to which the contractor may be entitled in respect of delay in the completion of the sub-contract works or any section thereof'. This is notable, for it makes express provision for doing that which the defendants claim should be read into this sub-contract. I should have expected, if that were so, to find a similar express provision in the sub-contract also, but none is to be found.

I entirely agree with Lord Denning MR that, the claim advanced by the defendants being both challenged and lacking quantification, it is impossible to say that cl 13 affords them any relief. Accordingly these plaintiffs, who have done work valued and certified at £27,870, ought not to be kept out of their money a moment longer. I accordingly concur in saying that this appeal should be allowed.

Unfortunately, Lord Denning MR, who delivered the main judgment, in rejecting the defence of the main contractor after deciding the question of construction of cl 13 of the sub-contract in favour of the sub-contractor, went on to make some general observations, which were in no way essential to the decision in the case, and were therefore obiter dicta, in the following terms ([1971] 2 All ER 1389 at pp 1392H–1393B; [1971] 1 WLR 1205 at p 1209E–G):

It must be remembered that a disputed claim cannot be referred at once to arbitration. Unless all agree, the determination of a disputed claim has to wait until the completion of the work. The arbitration clause makes that plain. It follows that, if Mr Knight's contention is correct, it would mean that his clients could hold this money (which is the sub-contractor's money) indefinitely. They could hold on to it until the end of the main contract, that is, until the whole work was completed. They could then hold on to it still longer whilst the dispute was referred to arbitration. They would not have to pay it over until the arbitration was concluded, maybe after a case stated to this court. That seems to me to run counter to the very purpose of interim certificates. Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that the

> sub-contractor can have the money in hand to get on with his work and the further work he has to do. Take this very case. The sub-contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims whether good or bad — except so far as the contract specifically provides.

In other words, by the above general observations, Lord Denning was suggesting that there was a special rule of construction applicable to cross-claims in the building contract cases which operated in the opposite direction to the principle laid down in *Mondel v Steel* (1841) 8 M & W 858 at pp 871–872; [1835–42] All ER Rep 511 at p 516 which is that when the buyer of the goods or the person for whom the work has been done is sued by the seller or contractor for the price, it is open to the defendant, in the absence of a provision in a contract to the contrary, to defend himself by setting off or setting up against the amount claimed, any damages which he has sustained as a result of the plaintiff's breach of the contract under which the goods were sold and delivered or the work and labour done and thus showing how much less the subject matter of the action was worth, by reason thereof.

With all due respect to Lord Denning, for the reasons stated in the later House of Lords case of *Gilbert-Ash*, we are unable to agree with him that an interim certificate or indeed any certificate issued by an architect or engineer pursuant to provisions of the RIBA and other known forms of building contracts and sub-contracts are to be treated virtually as cash, like a bill of exchange.

In our view, therefore, there is no special rule of construction operating in the building contract cases, such as was advocated by Lord Denning by way of obiter dictum in the *Dawnays* case, which lays down that contracts with provision for payment on certificates negative the ordinary common law right of set-off enunciated in *Mondel v Steel.*

In other words, we agree with the following passage in the judgment of Lord Morris in the *Gilbert-Ash* case ([1974] AC 689 at pp 699G–700A; [1974] 3 All ER 195 at pp 200J–201A; [1974] 3 WLR 421 at p 427C–D):

> When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts. ... Nor, if a contract provides for the issuing of interim certificates, should it be supposed that debts of a special class will come into existence, ie debts in relation to which there cannot under any circumstances be any defence or set-off. Provisions governing such interim certificates will probably be found in the contract.

But, having said that, it would be wrong to assume that just because the House of Lords had overruled the dictum of Lord Denning quoted above, including its suggestion that there was a special rule of construction applicable to cross-claims in the building contract cases which operated in the opposite direction to the principle laid down in *Mondel v Steel,* which

for brevity and convenience we would call the bill of exchange principle, that it had held that *Dawnays* was wrongly decided by the Court of Appeal.

We would interpolate, to remark, that the *Dawnays* case did not prevent the owner's or main contractor's cross-claims being litigated or arbitrated at the end of the day, but for all practical purposes, it conferred 'temporary finality' on the certificate and a right to immediate payment in full in the absence of an express contractual provision permitting deduction of the matter in question.

This leads us to an analysis of the judgments of the Law Lords in the *Gilbert-Ash* case in order to determine their impact on the *Dawnays* case.

We must, at this point, interject to mention that we have read, with much profit, the learned articles which have a bearing on this part of the case. We refer, in particular, to the articles by no less an authority than Mr Duncan Wallace QC entitled 'Set Back to Set-Off' (1973) 89 LQR 86; 'Set-fair for Set-off' (1974) 90 LQR 21; his note on *Mottram Consultants Ltd v Bernard Sunley Ltd* [1975] 2 Lloyd's Rep 197 in (1975) 91 LQR 471 and, per contra, to the article by Mr Adrian L Julian entitled '*Dawnays*, *Gilbert-Ash* and *Mottram*' (1976) 126 NLJ 141.

Now, in the *Gilbert-Ash* case, the sub-contract in question was not in standard form, the set-off providing by condition 14:

> If the sub-contractor fails to comply with any of the conditions of this sub-contract, the [main] contractor reserves the right to suspend or withhold payment of any moneys due or becoming due to the sub-contractor. The [main] contractor also reserves the right to deduct from any payments certified as due to the sub-contractor and/or otherwise to recover the amount of any bona fide contra accounts and/or other claims which he, the [main] contractor, may have against the sub-contractor in connection with this or any other contract.

It was held, on the true construction of condition 14 of the sub-contract, the words present (which were materially different from cl 13 of the sub-contract in the *Dawnays* case, quoted supra) clearly gave the main contractors the right to deduct from any payments certified as due to the sub-contractors quantified amounts bona fide claimed by them from the sub-contractors.

In *Gilbert-Ash*, their Lordships were concerned, with respect to construction industry contracts, to give the quietus to any suggestion that there were any special rules applicable to cross-claims in the building industry such as had been enunciated by Denning MR in the *Dawnays* case.

More particularly, their Lordships made it clear that the proposition that rights of set-off or counterclaim could not be raised in answer to interim certificates, as a matter of course, was quite untenable, and that each case turned upon the particular wording of the contract. Lord Salmon said ([1974] AC 689 at pp 722–723; [1973] 3 All ER 195 at p 220; [1973] 3 WLR 421 at p 448), and we totally agree, that:

> The parties to building contracts or sub-contracts, like the parties to any other type of contract are, of course, entitled to incorporate in their contract

> any clause they please. There is nothing to prevent them from extinguishing, curtailing or enlarging the ordinary rights of set off, provided they do so expressly *or by clear implication*. (Emphasis added.)

However, Lord Diplock required a somewhat stronger indication of an intention to displace the rights of set-off than did Lord Salmon and the other Law Lords who comprised the court, when he said ([1974] AC 689 at p 717; [1973] 3 All ER 195 at p 215; [1973] 3 WLR 421 at p 444):

> But in construing such a contract [a building contract] one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and *clear express words* must be used in order to rebut this presumption. (Emphasis added.)

In the *Dawnays* case, the contest was between the contractor and sub-contractor and the question for decision was whether, upon a proper construction of the sub-contract in the RIBA form, the contractor was entitled to deduct from the moneys certified to be due to the sub-contractor only sums established or admitted to be payable by the sub-contractor to him, *or* in addition, claims exceeding the sums certified to be due which were in dispute. This question of construction was obviously not free from difficulty for, as appears from the judgments of the House of Lords in the *Gilbert-Ash* case, there was a division of opinion.

Of the five Law Lords who comprised the Judicial Committee, only two, namely, Lord Diplock and Lord Salmon considered that the Court of Appeal had been wrong in deciding the construction point in the *Dawnays* case in favour of the sub-contractor. As for Viscount Dilhorne, this is what he said on the point at issue ([1974] AC 689 at p 713B; [1973] 3 All ER 195 at p 211F; [1973] 3 WLR 421 at p 439F):

> *If* that loss [in the *Dawnays* case] had been quantified as it was in the present case, in my opinion the decision in the *Dawnays* case would have been wrong. (Emphasis added.)

But the loss in the *Dawnays* case was *not* quantified, as appears quite clearly from the judgment of Edmund-Davies LJ, quoted above, which would necessarily imply that Lord Dilhorne too considered that the construction point had been rightly decided by the Court of Appeal in the *Dawnays* case. The remaining two Law Lords, namely, Lord Reid and Lord Morris of Borth-y-Gest, considered that *Dawnays* was probably rightly decided.

In *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197, the House of Lords had to consider a particular building contract providing for interim certificates, and the question for decision was whether the defendant employer, Mottram, could claim a set-off of money allegedly owed to it by the plaintiff builder, Sunley.

On the particular contract before them, the House of Lords held, dismissing the defendant Mottram's appeal by a majority of 3:2 (Lord Cross of Chelsea, Lord Wilberforce and Lord Hodson; Lord Salmon and Lord Morris of Borth-y-Gest dissenting) that the right of set-off had been excluded and that Sunley was entitled to summary judgment and leave to defend was refused.

A We note that in his powerful dissenting judgment, Lord Salmon in the *Mottram* case pointed out, in our view quite correctly, that the effect of the majority view was to depart from what had been held by the House of Lords in the *Gilbert-Ash* case, in so far as it purported to overrule *Dawnays*. Lord Salmon said (at p 215):

B > In my opinion, the only possible basis for their decision was the authority upon which they relied but which has subsequently been overruled by your Lordships' House. Accordingly, their decision cannot, in my view, be allowed to stand unless your Lordships are prepared to depart from what was decided in this House only a few months ago, and in addition, to uproot the principles governing the RSC O 14 proceedings which have been well
C > settled for generations.

And, at p 216, his Lordship added this:

> For my part I am convinced that it would be impossible and contrary to all authority (save the *Dawnays* line of cases which has been overruled) to allow the summary judgment against Mottrams to stand in circumstances such as
D > these.

But, more importantly, the significance of the *Mottram* case lies in the judgment of Lord Cross, which contains the reasons for the majority view, and which shows him applying the *expressio unius* principle in unmistakable terms. Here is what his Lordship said (at p 209):

E > One must, I think, first ask oneself what the position would have been had the contract not been varied. Suppose that Mottrams were alleging that the architect had negligently stated in several interim certificates that expenses had been incurred by the contractor in executing the works which had not in fact been incurred and were claiming to deduct the amounts which they
F > said had been improperly included in the earlier certificates from the amount stated to be due in a subsequent certificate. In the absence of any suggestion of fraud on the part of the architect or the contractor — and there is, of course, no suggestion of fraud here — I cannot see how it could have been argued that such a deduction could be made. Condition 28(d) states that the only sums which can be deducted from the amount stated to be due in
G > an interim certificate are: (i) retention money; and (ii) any sum previously paid. It is, *moreover*, to be noted that the printed form which the parties used provided for a third permissible deduction which the parties deleted. (Emphasis added.)

The deletion of the clause containing a third permissible deduction was therefore *an additional and not a decisive reason*, for the decision of the
H majority. In other words, even disregarding the fact that the parties had deleted the third permissible deduction clause, the decision of the majority in *Mottram* would have been the same, and so it cannot be said that the ratio decidendi of the case turned on this narrow point of construction.

We are fortified in the view we take of the ratio decidendi of *Mottram*
I by the fact that both Lord Hodson and Lord Wilberforce had concurred with the whole of the judgment of Lord Cross in unqualified terms.

In this context, we have not overlooked the point that in the *Gilbert-Ash* case, Lord Diplock had said ([1974] AC 689 at p 719G; [1973] 3 All ER 195 at p 217D; [1973] 3 WLR 421 at p 445H) that:

> ... The expressio unius rule of construction cannot be prayed in aid to exclude the right of the employer to set up breaches of other warranties in diminution or extinction of the instalment of the purchase price stated in the certificate as due.

As against that, Lord Reid, the presiding Law Lord in the same case, was clearly of the view that the principle did apply. Moreover, the case of *Gold v Patman* [1958] 2 All ER 497; [1958] 1 WLR 697 affords an illustration of the application of the *expressio unius* principle against a building owner.

In our view, therefore, the express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else, on the basis of the *expressio unius* principle.

In the present case, there are seven express provisions in the contract to which we have referred whereby the employer has the right of set-off but none of them is relevant to its alleged right to make the set-off for which it contends.

In our view, regard being had to these provisions of the contract, and applying the *expressio unius* principle, so far as claims for payment on certificates are concerned, the ordinary common law right of set-off had, in the words of Lord Salmon in the *Gilbert-Ash* case ([1974] AC 689 at pp 722–723; [1973] 3 All ER 195 at p 220; [1973] 3 WLR 421 at p 448) quoted above, been extinguished, not expressly but *by clear implication.*

We are further supported in the view we take by a decision of the Irish High Court 1976/1124 in *John Sisk & Sons v Lawter Products BV* digested in *Arbitration*, the Journal of the Institute of Arbitrators, Vol 44 No 3, April 1978 at p 152. In this case, the question as to the right of a contractor to obtain payment from an employer under a building contract on the basis of interim certificates issued by the architect where the certificates were disputed by the employer was considered.

The contract was the standard form (1966 Ed) issued by the Royal Institute of the Architects of Ireland and it included provisions for payments to be made from time to time during the progress of the works on the basis of certificates to be issued by the architect.

Three interim certificates had been issued by the architect but had not been honoured by the defendants. The plaintiffs claimed summary judgment for the amount of the certificates and the defendants objected on the grounds that the plaintiffs were in breach of contract by failing to complete the works by the agreed dates and that, as a result, the defendant had suffered damages.

Finlay J, in his judgment, commented upon the decision of the English courts — the *Dawnays* and *Gilbert-Ash* cases — which provided valuable guidance as the precise issue in the dispute did not appear to have been previously decided by the Irish courts.

Finlay J stated that the true test was not whether the common law right of set-off had by the terms of the building contract been unequivocally excluded, but rather as to *whether all the relevant terms of the building*

contract were in any particular event inconsistent with the exercise in that event of such a set-off.

The learned judge referred to the following clauses in the contract:

(a) a right of the contractor to payment of the amount certified subject only to specified deductions as in cl 29 (in pari materia with *cl 30(2)* of the contract in the present case);

(b) a right of the contractor *to suspend* the work on mere non-payment on an interim certificate (in pari materia with *cl 26(1)* of the contract in the present case); and

(c) a specific right of each party to refer disputes to arbitration not to be opened until after the practical completion of the works (in pari materia with *cl 34(2)* of the contract in the present case),

and held that the common law right of set-off was inconsistent with the above stated provisions and as such, allowed the plaintiff to enter summary judgment as claimed.

We agree that the effect of the judgment is to protect the essential requirement for interim payments, without which all but the smallest building contracts would be impossible provided that the other provisions of the standard form of the building contract are properly incorporated.

To revert to the contract in the present case, in applying the *expressio unius* rule, as aforesaid, we have not overlooked the case of *Acsim (Southern) Ltd v Dancon Danish Contracting & Development Co Ltd* (1989) 47 BLR 55, which would appear to be authority for the proposition that the mere express enumeration of permitted set-offs in a building contract does not imply that the defendant is confined to those remedies and nothing else, on the basis of the *expressio unius* principle.

Having said that, we would reiterate that the *Dawnays* case was rightly decided on the question of construction of cl 13 of the sub-contract there, for the reasons given by Edmund-Davies LJ reproduced above.

In so holding, we must also add that we have not overlooked the cogent submission advanced by Mr Duncan Wallace QC in his excellent work, 1 *Hudson's Building and Engineering Contracts* (11th Ed, 1995) (at p 854, para 6–194) that:

> ... it is of the essence of most interim payment provisions based on valuation of work done that the valuation relates to all the work done to date, not of the work since the last interim certificate. As a result, regarded from the owner's point of view, many errors of valuation arising, for example, from overestimation of the quantities of work done, or from the subsequent discovery of defective work or materials previously allowed as being satisfactory, can be expected to be rapidly and automatically remedied in a subsequent certificate, unless there is disagreement on the merits between the owner and his A/E.

As for the case of *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd* [1974] 2 MLJ 94, we regret that we are unable to agree with the following passage (at p 99 col 1B–C) in the judgment of Gill CJ, when speaking for the Federal Court, regarding the effect of the

Gilbert-Ash case on the *Dawnays* case, except on the bill of exchange principle:

> It was held by the Court of Appeal [in the *Dawnays* case] that since the main contractors' cross-claim for damages for delay was challenged and had not been quantified, it did not come within cl 13 of the sub-contract. *Dawnays'* case, however, was disapproved by the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* in which it was held that the common law right of a defendant to a set-off could only be taken away by clear, unequivocal words. Although this decision of the House of Lords was not binding on the learned trial judge, I do not think he was wrong in following it.

Gill CJ's view of the effect of the *Gilbert-Ash* case on the *Dawnays* case was, with respect, a mere ex cathedra pronouncement, made without any attempt at an analysis of the judgments of the Law Lords who comprised the court in the *Gilbert-Ash* case. Had he done so, as he undoubtedly should have, he might well have come to the conclusion, as we have, that three of the Law Lords in that case considered that the *Dawnays* case was rightly decided on the point regarding construction of cl 13 of the sub-contract. In any event, if we may add at the risk of being tedious, Lord Salmon had stated, quite categorically, in the House of Lords case of *Mottram*, that the effect of the majority view in *Mottram* was to depart from what had been held in the *Gilbert-Ash* case in so far as it purported to overrule the *Dawnays* case.

Gill CJ also failed to note the contrast in the wording of cl 13 of the sub-contract in the *Dawnays* case with condition 14 of the sub-contract in the *Gilbert-Ash* case, a point to which we have alluded. Indeed, in the *Gilbert-Ash* case, Lord Morris had pointed this out ([1974] AC 689 at pp 702C–703B; [1973] 3 All ER 195 at pp 202J–203G; [1973] 3 WLR 421 at pp 429E–430D) in the following terms:

> In that case [*Dawnays*] it was necessary to consider the meaning of certain words in a sub-contract which was different from the sub-contract now before us. Clause 13 of the sub-contract in that case is to be contrasted with condition 14 in the present case. Clause 13 entitled the contractor 'to deduct from or set off against any money due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under this sub-contract.'
>
> ...
>
> The decision of the Court of Appeal in that case [*Dawnays*] turned upon the meaning of the particular words there in question: it cannot guide decision in the present case. Leave to appeal was refused by the Court of Appeal and a subsequent petition for leave to appeal was dismissed. Had the case come up for review I consider, as at present advised, that an appeal ought to have failed.

In all the circumstances, our conclusion therefore is that having regard to the meaning of the particular words of the contract, in particular the clauses which we have referred to and discussed, there is *a clear implication* that the parties had intended that so far as claims for payment on certificates

were concerned, the ordinary common law right of set-off was to be extinguished.

That was sufficient to conclude this appeal in favour of the builder.

However, there are certain general observations we should like to add by way of postscript.

When, upon the proper construction of a particular contract which, of course, is a question of law, there is *no* obligation on the part of an employer in a main contract, or a main contractor in a sub-contract, to pay upon being served with a progress payment certificate, because of pending disputes, allegations of defects in works or materials or claims for damages for delay, without giving some reasonable amount of detail and quantification, are unlikely to result in the dismissal of an application for summary judgment under O 14 and leave to defend being given. (See *Kilby & Gayford Ltd v Selincourt Ltd* (1973) 229 EG 1343, CA).

As for the degree of proof required of a plaintiff builder in O 14 proceedings based upon an interim certificate issued by an architect or engineer pursuant to a construction contract, this has been variously described in *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 as 'indisputably due' (per Denning MR at p 35), 'as plain as could be' (per Denning MR at p 36) or 'beyond reasonable doubt' (per Bridge LJ at p 37). In his book *Keating on Building Contracts* (4th Ed), Mr Donald Keating QC, under the sub-heading 'Evidence supporting application for summary judgment', at p 279, says this:

> Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorized agent, or a certificate by the defendant's architect or engineer, which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend. Thus merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend.

In this context, the following passage in the judgment of Lawton LJ in the *Ellis* case (at p 36), indicates the correct approach which our courts should adopt in ordinary builders' claims under O 14:

> If the main contractor can turn round, as the main contractor has done in this case and say, 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life-blood. It seems to me that the administration of justice in our courts should do all it can to restore that life-blood as quickly as possible. ... In my judgment it can be done if the courts make a robust approach, as the Master did in this case, to the jurisdiction under O 14.

In the Singapore case of *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd* [1992] 1 SLR 884 at pp 889–890; [1991] APCLR 515 at pp 522–523, GP Selvam JC (as he then was) approved of Lawton LJ's

robust approach to the jurisdiction under O 14 in a construction contract case.

Also to the point are the four subsequent passages in the judgment of Lawton LJ in the *Ellis* case which we consider afford valuable guidance and read as follows:

> When the cocoon of legal argument which has been wrapped round this case with great skill by Mr Keating is unravelled, what is left is this; it is a straightforward case, save for the amount, of a claim by a builder for work done and materials supplied. It is the sort of case which would normally be dealt with by a common form affidavit for the purposes of the O 14 jurisdiction. The sub-contractors in this case did not think it right to deal with the matter by means of a common form affidavit. What they did was to produce long, carefully worded affidavits, giving a great deal of information to justify their claim. Mr Keating has attacked that claim. What does his attack come to?
>
> He says, first, that his clients do not know what work was done; secondly that they have not had an opportunity of looking at the supporting documents; thirdly, that they suspect that the plaintiffs have miscalculated the basis of their claim; and finally that they suspect that a lot of the work is defective.
>
> Now if a householder puts in an affidavit like that in answer to an ordinary builder's claim before the Master under O 14, he would get very short shrift indeed, because it has long been accepted that it is not an answer to a summons for judgment under O 14 to say, 'I dispute the claim and I suspect that it has been wrongly formulated'. The ordinary practice is that there must be some real basis, not a shadowy basis, for showing that there is an issue worthy of investigation by the courts. The defendants' answer amounts to no more than, 'We dispute the claim'. That is not enough.
>
> I have not overlooked that on the authorities, and in particular the decision of this court in *Contract Discount Corp Ltd v Furlong & Ors* [1948] 1 All ER 274, there are cases which merit unconditional leave to defend, even though the defendant is not able to point to any specific ground for contesting the claim. Each case must be decided on its own facts and with a degree of robustness, remembering what the background is.

In all the circumstances, we had no hesitation in allowing this appeal with costs both here and below, setting aside the judgment of Wan Mohammed J and substituting, in lieu thereof, summary judgment in favour of the builder for the sum certified to be due and payable to it under the penultimate progress payment certificate and interest thereon as prayed. The employer is, of course, at liberty to litigate its cross-claims aforesaid, should it so wish.

Deposit paid into court by way of security for costs was ordered to be refunded.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim